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Arbitrator

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

SAN DIEGO COUNTY WATER AUTHORITY,

Case No. 01-18-0000-9314

Claimant.

REASONED DECISION ON MOTION FOR
SUMMARY JUDGMENT

v.

SAN LUIS REY INDIAN WATER
AUTHORITY, CITY OF ESCONDIDO and
VISTA IRRIGATION DISTRICT,

Respondents.

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15 AUTHORITY, CITY OF ESCONDIDO and
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Respondents.

19 Before the Arbitrator are Cross-Motions for Summary Judgment
20 arising out of Respondents' San Luis Rey Indian Water Authority
21 ("IWA"), City of Escondido ("Escondido"), and Vista Irrigation
22 District ("Vista") (collectively Respondents) dispute with Claimant
23 San Diego County Water Authority ("SDCWA") over Supplemental Water.

24 As the parties agree, this dispute arises from a May 22,
25 2017 demand by Respondents that Claimant San Diego County Water
26 Authority ("SDCWA") deliver Supplemental Water made available by the
27 enactment and implementation of Public Law 100-675, the San Luis Rey
28 Indian Water Rights Settlement Act (the "Settlement Act" or "SA"),

1 that resulted from years of federal litigation determining the rights
2 of the (Settlement Parties: IWA, Escondido and Vista), that in part
3 caused Public Law 100-675 to be enacted November 17, 1998, whereby the
4 United States was authorized to arrange for a Supplemental Water supply
5 to the Settlement Parties of not more than 16,000 acre feet (AF) per
6 year from designated sources to implement providing Supplemental Water
7 to achieve the purpose of that legislation, to compensate for years
8 of improper appropriation of San Luis Rey River water to the detriment
9 of the IWA and Indian Bands, and to help supply the water needs of
10 both the Indian Bands and local entities, Escondido, and Vista.
11 Settlement Act § 103(a), p. 2, 1-7, and (b) 1-4, p. 3.

12 A. STIPULATIONS

13 The following stipulations, among others, are agreed to by
14 the parties and "are true for all purposes in this Arbitration."

15 1. Escondido and VID are required by contract to pay the
16 Indian Water Authority (IWA) for Supplemental Water. If
17 the 9,383 acre-feet of Supplemental Water were not
18 delivered as demanded in 2017, and if Escondido and VID
19 did not pay the Indian Water Authority for that water,
20 then the Indian Water Authority asserted that it would
21 have suffered an actual loss of more than \$7 million.

22 2. Escondido and VID as member agencies of the County Water
23 Authority, pay the County Water Authority for water they
24 obtained from the County Water Authority. The County
25 Water Authority asserted that for 2017 it would suffer a
26 loss of more than \$2 million in reduced revenues if it
27 delivered Supplemental Water as demanded, and Escondido

1 and VID were to receive 9,383 acre-feet of Supplemental
2 Water from the United States and the Indian Water
3 Authority rather than the water they would otherwise
4 obtain as members from the County Water Authority.

5 3. In 2017, 9,383 acre-feet of Supplemental Water were
6 delivered to Escondido and VID under the terms of the
7 Agreement Regarding Invoicing and Payment Dispute (IPA).
8 Escondido and VID, pursuant to their contract with the
9 Indian Water Authority, paid the Indian Water Authority
10 for that Supplemental water, thereby eliminating the
11 potential \$7+ million claimed loss by the Indian Water
12 Authority.

13 4. The (IPA) Agreement provides for the County Water
14 Authority to pursue its claim for more than \$2 million
15 against the Indian Water Authority. The County Water
16 Authority submitted its claim by way of its [February 11]
17 2018 (timely) Demand for Arbitration to the American
18 Arbitration Association. That Demand includes a claim
19 for "\$2,175,260.89 in damages, plus interest, and a 50%
20 split of arbitration fees." The Demand described the
21 two components of that claim, damages attributable to its
22 reduced revenues from lower transportation charges and
23 from sales of less water. The County Water Authority has
24 briefed the contract/restitutionary legal authority
25 supporting its demand in its opposition to the Summary
26 Judgment Motion filed by the Indian Water Authority.

27 5. The Motion for Summary Judgment filed by the Indian Water
28 Authority is intended by that party to be dispositive of

all potential damage claims presented in this action. So as to accommodate that motion and so as to allay any concerns that the County Water Authority is seeking relief other than as stated in its Demand, the County Water Authority hereby agrees that it is only pursuing the two components of damages sought in its Demand and described in ¶ 6 above, and that no other claims for damages will be sought in this action by amendment or otherwise.

B. ADDITIONAL UNDISPUTED FACTS

6. Although not a subject of the Stipulation, it is undisputed that the completion of related Federal Energy Regulatory Commission Proceedings (FERC) were not concluded until April 21, 2017, when final judgment dismissing the consolidated actions with prejudice was entered in the District Court, subject to the Court's continuing jurisdiction.

7. In a letter from Vista dated May 22, 2017, SDCWA was notified that the CA was absolutely final and effective. At VID's request, a May 16, 2017 meeting of representatives from SDCWA, Escondido, VID, and the IWA was held to discuss final conclusion of the FERC matter and the commencement of Supplemental Water deliveries by June 1, 2017.

8. The Agreement for The Conveyance of Water Among The San Diego County Water Authority, The San Luis Rey Indian Settlement Parties, and The United States (collectively the Settlement Parties) (the "CA" or Conveyance Agreement), resulted from the SA, authorizing the United

1 States to arrange for a supplemental water supply for the
2 Settlement Parties for every year following the effective
3 performance date for commencement of the delivery of
4 Supplemental Water of not more than 16,000 AF per year.
5 The United States Secretary of the Interior was authorized
6 to make water available pursuant to the "Allocation
7 Agreement." Under the terms of the SA to which SDCWA was
8 not a party, the Settlement Parties and the United States
9 intended to provide the SDCWA with "equitable and
10 sustainable consideration for its role in providing for
11 the timely utilization of the Supplemental Water by the
12 Settlement Parties." SA EXPLANATORY RECITALS, K, p. 4.
13 This compensation was foundationally quantified by the
14 CA.

15 9. According to the Allocation Agreement and the Agreement
16 Relating to Supplemental Water among the Metropolitan
17 Water District Southern California (the Met), the United
18 States agreed to furnish Metropolitan with up to 16,000
19 AF of Supplemental Water per year, some or all of which
20 the Met agreed to exchange for a like quantity of water
21 to be delivered to the United States for the benefit of
22 the Settlement Parties, at the delivery point or points
23 for delivery of water from the Met to SDCWA for conveyance
24 to the Settlement Parties.

25 10. The term of the Agreement is indefinite and exists "for
26 so long as Supplemental Water is available for use by the
27 Settlement Parties." CA TERMS AND CONDITIONS, No. 1, p.

28 5. Under the CA, TERMS AND CONDITIONS, Nos. 2 and 3, p.

1 5, the United States furnishes all Supplemental Water to
2 be conveyed by SDCWA at the delivery point or points from
3 the Met to SDCWA, or at such other locations as are
4 mutually agreed by the parties. Under TERMS AND CONDITION
5 No. 3, p. 5, a sole statutory exception excuses the annual
6 delivery of Supplemental Water to the Settlement Parties,
7 otherwise, "SDCWA shall convey Supplemental Water
8 furnished to it by the United States for use by the
9 Settlement Parties, except at times when all of the
10 available capacity in that portion of its facilities which
11 is needed to convey the Supplemental Water is being used
12 for the delivery of SDCWA's water to its member public
13 agencies." (Emphasis added.) Noteworthy, "Availability
14 of capacity shall be determined by SDCWA at its reasonable
15 discretion." SDCWA offered no evidence that all available
16 capacity of its relevant facilities were being used in
17 2017.

18 C. SDCWA RIGHT TO PAYMENT FOR CONVEYING SUPPLEMENTAL WATER

19 Under CA TERM AND CONDITION No. 4, p. 5, subsections a and
20 b, SDCWA has no authority to impose any charges on Supplemental Water
21 delivered to the Settlement Parties directly from the Met's water
22 distribution system without use of any portion of SDCWA's water
23 distribution system.

24 Under TERMS AND CONDITIONS No. 4., subsection b., each
25 month, the Settlement Parties shall pay SDCWA the lesser of "the
26 following amounts for conveying Supplemental Water to any portion of
27 SDCWA's water distribution system:

1 i. A transportation charge of \$55.00 for each acre-foot
2 of Supplemental Water conveyed by SDCWA for use by the
3 Settlement Parties in 2004, thereafter, the
4 transportation charge will increase at the rate of one
5 and fifty-hundredths percent (1.55%) per year for as
6 long as this Agreement is in effect.

7 Or

8 ii. SDCWA's transportation rate in effect for conveying
9 water through the SDCWA facilities.

10 CA No. 4., subsection c., p. 5, limits the imposition of any
11 rates or charges other than those set forth in subsection b., for, or
12 based on, "SDCWA shall not impose any rates or charges other than
13 those set forth in subsection b., for, or based on, any Supplemental
14 Water delivered to the IWA or the Indian Bands for use on the
15 reservations either directly or indirectly, including Supplemental
16 Water received by Escondido or Vista in exchange for Local Water
17 delivered by or allocated by them for use on the reservations. This
18 unambiguously prevents SDCWA from charging a non-Supplemental Water
19 price for Supplemental Water or a non-Supplemental transportation
20 charge for conveyance, except as set forth by the SA and CA.

21 However, under subsections of CA No. 4., p. 6, subsections
22 d. and e., except for Supplemental Water delivered or exchanged for
23 the sole benefit of SDCWA or the Indian Bands for use on their
24 reservations referred to in subsection c., Supplemental Water conveyed
25 to Escondido or Vista for use within the service areas of those
26 entities may be included within SDCWA's calculation of water
27 deliveries to Escondido and Vista for the purpose of determining any
28 SDCWA rates or charges that are calculated based on total water

1 deliveries to SDCWA's member public agencies using SDCWA facilities
2 to the same extent that such rates and charges are imposed on SDCWA's
3 member public agencies. Further, under subsection e., if SDCWA
4 establishes a charge for treated water, "then on a monthly basis, the
5 Settlement Parties shall pay SDCWA's treatment charges applicable for
6 treated water delivered to the local Entities for SDCWA's member public
7 agencies in the immediate vicinity of the reservations." CA SS d and
8 e appear to create a carve-out for Supplemental Water delivered to and
9 used within the service area of those specific members' areas at SDCWA
10 members' water and transportation prices.

11 CA No. 4. Subsection f., p. 7, prevents any other fees or
12 charges, including but not limited to taxes in lieu or annexation
13 fees, from being assessed or imposed by SDCWA on the United States or
14 the Settlement Parties in return for conveying Supplemental Water.

15 Under CA No. 4, subsection g., p. 7., nothing in the CA
16 precludes SDCWA from imposing fees or charges including but not limited
17 to taxes, in lieu taxes, or annexation fees for provision of services
18 other than those provided by the CA, or as the result of inclusion of
19 land within the service territory of SDCWA or a member public agency
20 of SDCWA.

21 CA Subsection h., p. 7., expresses the Parties' intent that,
22 notwithstanding any future modifications to SCDWA's rate structure,
23 the benefits set forth in subsections a through f, shall not be
24 impaired and the burdens shall not be increased. Subject to an
25 exception that subsections b. through f. do not excuse Escondido or
26 Vista from any obligations of member public agencies of the SDCWA (to
27 which they are members), except as those obligations relate
28 specifically to Supplemental Water as addressed in those subsections.

1 This section is a carve-out and reinforces that Supplemental
2 Water is not subject to member public agency SDCWA rates.

3 D. PROTOCOLS

4 CA No. 4., subsection i., p. 7., provides: "Before delivery
5 of Supplemental Water, SDCWA and the Settlement Parties will develop
6 a protocol for determining the actual monthly quantity and flow rates
7 of Supplemental Water delivered or exchanged to the IWA or the Indian
8 Bands for use on the reservations and the actual monthly quantity of
9 Supplemental Water delivered or exchanged for the use of the Local
10 Entities."

11 Subsection i., further provides that the protocol shall
12 "subject Supplemental Water delivered by [Met] into SDCWA facilities
13 for conveyance to the Settlement Parties but not taken, or rejected,
14 by the Settlement Parties, to provisions which are comparable to those
15 applicable to other water ordered by SDCWA's member public agencies
16 and delivered into SDCWA's facilities but not taken or rejected by
17 them. There is no evidence this was not done.

18 Additionally, the CA No. 4., subsection 1., p. 7 protocol
19 was required to include provisions for invoices to the Settlement
20 Parties and payments to the SDCWA. "All invoices and payments shall
21 be coordinated through the IWA." The protocol shall be consistent
22 with section 5 of this Agreement. There is no disagreement that the
23 2017 Supplemental Water was used on Local Entities service areas and
24 paid for at preferred non-member rates.

25 Provisions concerning failure to make payments and/or to
26 terminate deliveries are not in dispute. CA No. 5., subsection c.,
27 i. and ii., p. 8, provide the manner of making requests for conveyance
28 by SDCWA for which there is no dispute.

1 To its credit, SDCWA complied with the Settlement Parties'
2 requests for actual conveyance of Supplemental Water for the 2017
3 water year, subject to SDCWA's reservation of rights. There is no
4 dispute over the substance of the Settlement Parties' 2017 requests
5 for Supplemental Water, rather the dispute is over alleged lack of
6 timeliness of requests and protocols.

7 Under CA No. 12, Dispute Resolution Mediation: Arbitration
8 - the parties have stipulated and agreed that pursuant to section 12b,
9 this dispute could not be settled through negotiation or through
10 mediation. As a result, CA No. 13, p. 11, calling for Dispute
11 Resolution by Arbitration applies. The parties further agreed that a
12 single arbitrator should preside over and resolve the issue(s)
13 submitted, recognizing the Arbitrator "shall not re-write, change, or
14 amend" the CA.

15 E. INTEREST

16 Under CA No. 13, subsection c., p. 11, any payment
17 adjustments "shall accrue interest monthly at the average rate earned
18 by SDCWA on its funds from the date the adjusted payment should have
19 been paid until paid in full." The parties have agreed to waive the
20 time limits of CA No. 13., subsection d., p. 12, and the Reasoned
21 Decision shall be in writing rendered within 30 days following
22 submission of the case. Under the CA, each party bears the expense
23 of its own counsel, experts, witnesses, and preparation and
24 presentation of evidence. The administrative fees of arbitration and
25 the Arbitrator's fees are borne 50% by SDCWA and 50% by the IWA, Vista,
26 and Escondido, jointly, to which the parties agree.

27 F. FORCE MAJEURE

1 CA No. 21., p. 13, "Uncontrollable forces," has no
2 application to this arbitration as proper notice of any uncontrollable
3 force was not given by Respondents nor was the Uncontrollable Force
4 provision invoked as an affirmative defense in this arbitration.

5 **G. GOVERNING LAW**

6 CA No. 22., p. 14, provides, "the CA shall be interpreted,
7 governed by, and construed under applicable federal law and the laws
8 of the State of California to the extent such state laws are not
9 inconsistent with any applicable federal law." (Emphasis added.) More
10 specific federal laws other than the Settlement Act, Title I of Public
11 Law 100-675 as amended, the allocation agreement, the Conveyance
12 Agreement, and California substantive law apply.

13 **LAW AND ANALYSIS**

14 **H. BRIEF HISTORY**

15 The November 17, 1988 San Luis Rey Indian Water Rights
16 Settlement Act defined the Settlement Parties including but not
17 limited to the LaJolla, Rincon, San Pasqual, Palma, Pala Bands of
18 Mission Indians (the "Bands"), and the Indian Water Authority (IWA),
19 meaning the San Luis Rey River Indian Water Authority and intertribal
20 Indian entity established by the Bands. Additional Settlement Parties
21 include two local entities, the City of Escondido, the Escondido Mutual
22 Water Company and the Vista Irrigation District. SA Section 102,
23 subsection 1 and 2, p. 3.

24 **I. STATUTORY PURPOSE**

25 Congressional Findings supporting the SA legislation include
26 that the Settlement Parties need a reliable source of water. The San
27 Luis Rey River is inadequate to supply the needs of both the Bands and
28 local entities, giving rise to the extended litigation over

1 entitlement to San Luis Rey River water. Congressional Findings (a) 1-
2 3, p. 2.

3 For many years, the Bands were unable to obtain sufficient
4 water, which created adverse circumstances and conditions. Findings
5 § 103(a) 3-4, 1-1, p. 2. The purpose of the Indian Water Rights SA
6 was to provide for settlement of the reserved water rights claims of
7 all the Bands to provide the Bands with a reliable water supply
8 sufficient to meet their present and future needs. Congressional
9 Findings (b), 1-4, pp. 1-2. An important result of the SA is to
10 satisfy the Federal Government's "trust responsibility" to the Bands,
11 consistent with its fiduciary duty, and to protect the local entities,
12 premised on the concept the Bands and local entities would make fair
13 and reasonable contributions. Congressional Finding § 103(a) 6, p. 2.

14 The United States' contribution to the settlement included
15 funding and delivery of water from a supplemental source; i.e., water
16 developed through conjunctive use of ground water on public lands in
17 Southern California or water to be reclaimed from lining the previously
18 unlined portions of the All American Canal and its Coachella Branch.
19 Congressional Finding § 103(a) 7, p. 2 and CA Recital E, p. 3.

20 As a matter of legislative interpretation, Federal law,
21 specifically, Public Law 100-675, takes precedence over California
22 contract law to the extent state law is inconsistent and it would
23 defeat the overriding Federal statutory purpose of the SA to provide
24 Supplemental Water to the Settlement Parties at the lower statutory
25 prices. CA No. 22, p. 14.

26 Under SA § 106(a), p. 4, specifying duties of the United
27 States for development of Supplemental Water, the Secretary of the
28 Interior is authorized and directed to arrange for the development of

1 not more than a total of 16,000 AF per year of Supplemental Water from
2 designated sources excluding the Central Valley Project and the cost
3 of delivering and developing Supplemental Water shall not be borne by
4 the United States, and no Federal appropriations are authorized for
5 this purpose. *Id.*, SA § 106(b), p. 4.

6 The terms and conditions of water deliveries to provide
7 Supplemental Water at locations, on a schedule, and under terms and
8 conditions were to be agreed upon by the Secretary of the Interior,
9 the IWA, the local entities and any agencies participating in the
10 delivery of the water. SA § 106(c), p. 4. Section 105 of the Public
11 Law 100-675 following its initial passage created a \$30MM San Luis Rey
12 fund. The SA and the Conveyance Agreement make categorically true
13 that the United States, its applicable administrative agencies, and
14 the parties to the SA and Conveyance Agreement are bound to perform
15 their statutory and contractual obligations to assure that 16,000 AF
16 of annual Supplemental Water are delivered to the Settlement Parties
17 in accordance with the terms and conditions of the Settlement Act and
18 related agreements. This is a preemptive and overriding purpose of
19 this federal law. That the SDCWA is a facilitator by and through its
20 contractual obligations to convey water as part of the overriding
21 statutory purpose and trust obligation of the United States to the
22 Indian Bands, cannot be interpreted to permit the SDCWA to interfere
23 with, obstruct, or hold hostage Supplemental Water, from any party
24 entitled thereto under the SA. SDCWA is an important participant, but
25 a subordinate party to the ultimate goal of the federal government
26 providing Supplemental Water under the SA.

27 J. CONDITIONS PRECEDENT

28

1 SDCWA objected that the requirements of the CA, section
2 5.e., excused it from conveying Supplemental Water in 2017, because
3 conditions precedent to any duty to convey Supplemental Water were not
4 satisfied. These include that "the Settlement Parties shall provide
5 SDCWA with an estimate of the schedule of the conveyance of
6 Supplemental Water before April 1 of each year in a form provided by
7 the SDCWA, with an estimate of the amounts of Supplemental Water to
8 be conveyed through any direct connection to SDCWA's distribution
9 system which also included the requirement that:

10 "Each estimate shall contain, at a minimum,
11 for each direct connection to SDCWA's
12 distribution system and for each month of the
13 year beginning with the succeeding July 1,
14 estimates for the succeeding four years, the
15 quantity of Supplemental Water to be conveyed
16 directly by SDCWA to the United States for
17 the use of Settlement Parties. The estimate
18 shall constitute the Settlement Parties'
19 initial request for deliveries for the first
20 of the five years covered therein."

21 SDCWA argues that failure to meet the April 1 deadline is a
22 condition precedent that excused any duty of counter-performance on
23 its part to provide Supplemental Water for 2017, as it was impossible
24 to do so. There is no legal authority to create "conditions precedent"
25 inconsistent with the purposes of the SA.

26 In addition to the inability of the Settlement Parties to
27 provide an estimate of the quantity, a conveyance schedule of
28 Supplemental Water, invoices and payments by April 1, 2017, CA No. 4.,
subsection i. (§4i), called for:

29 "Before delivery of Supplemental Water,
30 SDCWA and the Settlement Parties will develop
31 a protocol for determining the actual monthly
32 quantity and flow rates of Supplemental Water

1 delivered or exchanged to the Indian Water
2 Authority or the Indian Bands for use on
3 their reservations and the actual monthly
4 quantity of Supplemental Water delivered or
5 exchanged for the use of the Local Entities.
6 [The 2017 Supplemental Water was to be used
7 by Escondido and Vista, the Local Entities.]
8 The protocol shall subject Supplemental
9 Water delivered by the Metropolitan into
10 SDCWA's facilities for conveyance to the
11 Settlement Parties but not taken, or
12 rejected, by the Settlement Parties to
13 provisions which are comparable to those
14 applicable to other water ordered by SDCWA's
15 member public agencies and delivered into
16 SDCWA's facilities, but not taken or rejected
17 by them. The protocol shall also include
18 provisions for invoices to the Settlement
19 Parties and payments to the SDCWA. All
20 invoices and payments shall be coordinated
21 through the Indian Water Authority. The
22 protocol shall be consistent with section 5
23 of this Agreement. (Emphasis added.)

24
25 Despite continuing negotiations that started in the summer
26 of 2017, the parties did not reach agreement on the protocols and the
27 IPA until December 11, 2017. No party has claimed bad faith in these
28 negotiations on either side.

29
30 **K. SDCWA RESERVATION OF RIGHTS**

31 In a May 30, 2017 letter response from SDCWA, its general
32 manager, Ms. Stapleton, notified Escondido and Vista that the
33 authority's position was that the failure to place an order for
34 delivery of Supplemental Water by April 1, 2017, violated the CA
35 section 5.e., and prevented SDCWA from delivering any supplemental
36 water by June 1, 2017. The Settlement Parties were required to provide
37 the Authority with an estimate of a schedule for conveyance of
38 Supplemental Water before April 1 of each year in form provided by
39 SDCWA, with an estimate of amounts of Supplemental Water to be conveyed
40

1 through any direct connection to SDCWA's distribution system. This
2 included an estimate for each direct connection to the Authority's
3 distribution and for each month of the year beginning with each
4 succeeding July 1 and for all service connections collectively for
5 each month of the succeeding four years through 2022 of the quantity
6 of the Supplemental Water to be conveyed directly by the Authority to
7 the United States for the use of the Settlement Parties.

8 The Settlement Parties in their May 22, 2017 letter to Ms.
9 Stapleton, rejoined: "their late start would not materially
10 inconvenience SDCWA because: (1) there would not be a change in the
11 scheduling, ordering, or delivering of wet water to any party resulting
12 from implementing the Conveyance Agreement in 2017; and (2) only the
13 accounting and billing for the delivery of both the Supplemental and
14 non-Supplemental Water would be affected in 2017." The Settlement
15 Parties anticipated billings under the CA would initially be in arrears
16 and may require correction to the June and possibly July invoices to
17 the City of Escondido and Vista. The Settlement Parties promised to
18 deliver an initial draft of accounting procedures within the next
19 couple of weeks after May 22, 2017. This is interpreted as invoking
20 an immaterial breach.

21 Following SDCWA's objection in its May 30, 2017 response
22 letter, SDCWA noted mutual development of a joint protocol for
23 deliveries was required under CA sections 4.i., and 5.e., in addition
24 to the April 1st Schedule Notice requirement. Next, the CA requires
25 coordination with the Met, the agency delivering the water to the
26 Authority. CA Recitals J, p. 4, and N, p. 5, and Nos. 2, 4(i) and
27 5(e), p. 5, also were impacted by a pending dispute with the Met over
28 unilateral allocation of water earlier in 2017 to the Exchange

1 Agreement deliveries. Coordination issues remained to be worked out.
2 Finally, fiscal issues needed to be addressed with respect to SDCWA
3 treated water, and how payment would be made. In fact, no treated
4 water is at issue. SDCWA stated delivery by June 1, 2017 "was
5 impossible, but could be worked out for delivery commencing before
6 July 1."

7 L. IPA AGREEMENT

8 Meetings were held between the parties which resulted in the
9 Agreement Regarding Invoicing and Payment Dispute (IPA) executed
10 December 11, 2017. In the IPA, the parties acknowledged their
11 participation in the CA and effectuated a settlement and compromise
12 for the conveyance, delivery, invoicing, and payment of the
13 Supplemental Water as requested by the Settlement Parties for the
14 period from June 1, 2017 through December 31, 2018, expressly
15 preserving an option for SDCWA to claim damages for 2017 Supplemental
16 Water deliveries under the dispute resolution provisions of the CA.
17 The IPA effectuated a partial resolution of certain invoicing and
18 payment issues under the CA subject to SDCWA's reservation of all
19 rights to claim: (1) It was not obligated to deliver the 9,383 AF of
20 Supplemental Water to the Settlement Parties during calendar year
21 2017; and (2) had the right to seek a monetary recovery from the IWA
22 for any alleged 2017 monetary losses attributable to the SDCWA's
23 complying with the requested June 1, 2017 start date. SDCWA validly
24 reserved all rights and waived no claims concerning its alleged 2017
25 monetary losses and the parties agree nothing in the IPA can be used
26 against SDCWA to seek to void SDCWA's claims.

27

28

1 A reservation and non-waiver of any claims unrelated to the
2 dispute of SDCWA's right to recover for alleged 2017 losses remained
3 intact.

4 M. DISPUTE RESOLUTION PROCESS

5 The parties agreed to a dispute resolution process, to wit;
6 arbitration, which they have undertaken and is now in its final stages.
7 This Arbitration is limited to the sole issue of the SDCWA's alleged
8 monetary losses for 2017 Supplemental Water deliveries. IPA section
9 7.b., p. 7

10 In the event the Authority is awarded damages arising from
11 the 2017 Supplemental Water deliveries, the IWA is solely responsible
12 for such payment. IPA Section 7.c., p. 7.

13 N. LAW RE: DISPOSITIVE MOTIONS

14 "A trial court properly grants a motion for summary judgment
15 only if no issues of triable fact appear and the moving party is
16 entitled to judgment as a matter of law. The moving party bears the
17 burden of showing the court that the plaintiff 'has not established
18 and cannot reasonably expect to establish a *prima facie* case'"
19 [Citation.]' [Citation.] '[O]nce a moving defendant has "shown that
20 one or more elements of the cause of action, even if not separately
21 pleaded cannot be established," the burden shifts to the plaintiff to
22 show the existence of a triable issue; to meet the burden, the
23 plaintiff "may not rely upon the mere allegations or denials of its
24 pleadings . . . but, instead shall set forth the specific facts showing
25 that a triable issue of material fact exists as to that cause of action
26'" *Coyle v. Historic Mission, Inc.* (2018) 24 Cal.App.5th 627,
27 634; see also, *Sakai v. Massco Investments, LLC* (2018) 20 Cal.App.5th
28 1178.

1 A defendant moving for summary judgment must show "that one
2 or more elements of the cause of action . . . cannot be established,
3 or that there is a complete defense to the cause of action." (Code
4 Civ. Proc. § 437c, subd. (p)(2).) Here, the issue of whether SDCWA
5 had the right to defeat the entire statutory scheme mandating that
6 Supplemental Water be delivered to the Settlement Parties when
7 available, presents a pure question of law. The determination of duty
8 and of contract, including statutory purpose present questions of law.
9 *Sakai*, 20 Cal.App.5th at p. 1184. See, *Lafferty v. Wells Fargo Bank*,
10 N.A. (2018) 25 Cal.App.5th 398, 409. The final responsibility for
11 interpreting a statute or regulation rests with the court. For
12 regulations and statutes, the court's guiding principle "is to
13 ascertain the intent of the lawmaker so as to effectuate the purpose
14 of the law." *Singh v. Superior Court* (2006) 140 Cal.App.4th 387, 392.

15 "It is a judicial function to interpret a contract or written
16 document unless the interpretation turns upon the credibility of
17 extrinsic evidence." *Citizens for Amending Proposition L v. City of*
18 *Pomona* (2018) 28 Cal.App.5th 1159; 239 Cal.Rptr.3d 750, 775.

19 There is no ambiguity nor dispute in the plain language of
20 either the SA statute or the CA contract, when it comes to the duty
21 of the United States to provide Supplemental Water and the duty of
22 SDCWA to convey Supplemental Water at the prescribed rate to achieve
23 the statutory objectives to provide the Bands a reliable water supply;
24 and to establish the basis for a mutually beneficial, lasting, and
25 cooperative partnership among the Bands and the local entities to
26 replace the adversary relationships that have existed for several
27 decades; and fosters the development of an independent economic base
28 for the Bands. SA § 103(b) 1-4, pp. 2-3.

1 **O. NO RESTITUTION**

2 SDCWA relies on Restatements of the Law 3d, Restitution and
3 Unjust Enrichment § 35 Performance of Disputed Obligation and Cal.
4 Commercial Code § 1308 (formerly § 1207). *Uzyel v. Kadisha* (2010) 188
5 Cal.App.4th 866, 894.

6 SDCWA validly reserved its rights to preserve a claim for
7 restitution to recover the value of the "benefit conferred" in excess
8 of the recipient's contractual entitlement. The party on whom demand
9 was made and rendered performance under a full reservation of rights
10 must act in good faith and reasonable protection of SDCWA's interest.
11 There is no basis for restitution as the Supplemental Water cannot be
12 returned nor should the payments therefor be returned.

13 The essence of SDCWA's performance was based on its
14 conscious and allegedly justifiable resistance to "a demand for
15 performance that was not in fact due." SDCWA in effect contends that
16 it was unreasonably compelled by circumstances to render a performance
17 to which the Settlement Parties were not entitled, to avoid a greater
18 risk of loss to the IWA. Further, that it was impossible to comply
19 with the April 1 deadline due to the FERC matter.

20 **P. CONTRACT INTERPRETATION**

21 The goal of contractual interpretation is to determine and
22 give effect to the mutual intent of the parties. *Safeco Inc. Co. v.*
23 *Robert S.* (2001) 26 Cal.4th 758, 763. A contract must receive such
24 an interpretation as will make it lawful, operative, definite,
25 reasonable, and capable of being carried into effect, if it can be
26 done without violating the intention of the parties. Cal. Civ. C. §§
27 1643 and 1644. If possible, the court should give effect to every
28

1 provision of the contract. *National City Police Officers' Assn. v.*
2 *City of National* (2001) 87 Cal.App.4th 1274, 1279.

3 Q. RESTATEMENT 3d CONTRACTS

4 Under the Rest. 3d, SDCWA further contends that its risk of
5 liability for non-performance outweighed the amount in controversy
6 (over \$2 million versus over \$7 million potential liability to the
7 IWA). SDCWA contends it lacked any meaningful opportunity to have a
8 disputed claim adjudicated prior to performance in light of the
9 Settlement Parties' demand that delivery of Supplemental Water for
10 2017 start within approximately 14 days following the formal demand
11 for such delivery.

12 SDCWA relies on the "voluntary payment rule" discussed in
13 Rest. 3d providing that when the cost of resistance includes a risk
14 of further loss or liability beyond the amount already in controversy,
15 it had no practical alternative, but to submit by delivering water.
16 This compulsion made its performance "not voluntary" because the IWA
17 demand of over \$7 million far exceeded the over \$2 million alleged
18 SDCWA stood to lose. This contention is misplaced. There was a
19 preemptive statutory purpose to provide the Settlement Parties with
20 up to 16,000 AF of Supplemental Water each year. Further, Supplemental
21 Water could not be charged to the Settlement Parties for any price in
22 excess of the lower statutory price.

23 SDCWA has constructively admitted that the 9,383 AF of
24 Supplemental Water was not SDCWA water, by its admission this was
25 "Supplemental Water" provided by the United States. SDCWA had no
26 right to charge its prevailing member price or market price for such
27 Supplemental Water. There is no evidence that SDCWA was required to
28 use its own water, it did not. Rather, the undisputed evidence is

1 that the 9,383 AF of Supplemental Water was provided by the United
2 States through the Met for conveyance by SDCWA through its conveyance
3 system.

4 It is the Department of Interior's Bureau of Reclamation
5 that is legally required to provide Supplemental Water, not SDCWA,
6 under the terms of Public Law 100-675. SDCWA acknowledged as much at
7 the hearing and in its opening brief at pp. 21-22. SDCWA was not
8 required to use its own water, for which it claims to be entitled to
9 charge its "regular" member price. The water in dispute was
10 "Supplemental Water," for which no more than the statutory price under
11 the SA and the CA could be charged as well as for transportation cost.
12 This ends the claim of the SDCWA that the alleged breaches of the CA
13 caused it to lose water sales of its own water.

14 SDCWA never had to furnish Supplemental Water at a higher
15 price than the Settlement Parties were required to pay. To the extent
16 separate damages consisting of part of the claimed \$2,175,260.89,
17 include alleged damages for reduced transport charges, there is no
18 legal authority that would allow SDCWA to charge higher market rate
19 or member transport charges. SDCWA also admits the Met gave it credit
20 against Met billings for the 9,383 AF that were Supplemental Water.

21 R. SDCWA RIGHTS

22 SDCWA has misinterpreted its rights and duties under the CA.
23 CA No. 3, p. 5, mandates that SDCWA "shall convey the Supplemental
24 Water furnished to it by the United States for use by the Settlement
25 Parties, . . ." SA Section 106(a), p. 4, of the Indian Water Rights
26 Settlement Act, 102 Stat. 4000, as implemented by the CA, directs the
27 Secretary of the Interior to arrange for the development of not more
28 than 16,000 AF per year for Respondents and the Bands.

1 In terms of which party is ignoring the law, SDCWA has
2 ignored that the enabling statutes, the SA, and the CA, absolutely
3 direct the United States to provide for development of and arrange for
4 annual delivery of 16,000 AF of Supplemental Water. SDCWA also does
5 not address that it was impossible to develop or convey Supplemental
6 Water before May 17, 2017, although the United States was willing to
7 make Supplemental Water available since 2003. It was not SDCWA's
8 prerogative to override the law to withhold Supplemental Water until
9 2018.

10 Since, under the CA, water deliveries were not to commence
11 before July 1 of any year, there is no evidence that Supplemental
12 Water, as required by law, was not available for delivery in water
13 year 2017, nor that SDCWA had any legal right to transmute the 2017
14 Supplemental Water into SDCWA water which it could sell at its
15 prevailing or member rates.

16 SDCWA admits that Supplemental Water was available for use
17 by the Settlement Parties when the San Luis Rey Indian Water Rights
18 Settlement could be physically implemented on May 17, 2017. The
19 contention that SDCWA is entitled to be paid member rates for that
20 Supplemental Water is simply wrong.

21 S. LIMITS ON SUPPLEMENTAL WATER CHARGES

22 Under CA No. 4., subsection d., p. 6, if Supplemental Water
23 is conveyed to Escondido or Vista for use within the service areas of
24 those entities, such water may be included within SDCWA's calculation
25 of water delivered to Escondido and Vista for the purpose of
26 determining any SDCWA rates or charges that are calculated based on
27 total water deliveries to SDCWA's member public agencies using SDCWA
28

1 facilities, to the same extent that such rates and charges are imposed
2 on SDCWA's member public agencies.

3 Beyond that, pursuant to CA No. 4, subsection (f), p. 7, "No
4 other fees or charges including, but not limited to taxes, in lieu
5 taxes, or annexation fees, shall be assessed by SDCWA on the United
6 States or the Settlement Parties in return for conveying Supplemental
7 Water." CA No. 4., subsection h., p. 7, makes clear that in the event
8 of any SDCWA future modifications to its rate structure, the benefits
9 to the Settlement Parties provided by subsections a-f shall not be
10 impaired and the burden shall not be increased. Nonetheless, nothing
11 in subsections b-f is intended to excuse Escondido or Vista from any
12 of the obligations of member public agencies of the SDCWA except as
13 those obligations relate specifically to Supplemental Water as
14 addressed in those subsections. This makes clear that SDCWA had no
15 legal right to treat 2017 Supplemental Water as member water to impose
16 higher charges to create monetary damages. There is no evidence
17 whatsoever that SDCWA has sustained monetary damage in carrying out
18 its absolute legal duty to convey Supplemental Water when it was made
19 available. SDCWA's proposed "damages" violate federal law, the SA and
20 CA.

21 Although there was a total reservation of rights by SDCWA,
22 the unique factual circumstances of the later availability of
23 Supplemental Water for 2017 postponed development of any protocols,
24 which the Settlement Parties, Escondido and Vista, offered to do within
25 two weeks. The evidence that it took longer to do so was not a cause
26 of monetary damages as appropriate adjustments were made for delivery,
27 invoicing, and payment. CA No. 4, subsection i., p 7,

28

1 There is no evidence that SDCWA suffered any monetary
2 damages in excess of what the law authorized it to charge Escondido,
3 Vista, and IWA, the responsible payor. SDCWA suffered no monetary
4 damages for alleged misappropriation of water, which it was unable to
5 sell on the market, because it was never legally entitled to change
6 the legal character of what was Supplemental Water. Further, there
7 is no evidence that any transportation charges in excess of the
8 statutory rate provided for by the CA in Nos. 4.a., b., and c., were
9 charged, and as previously discussed, could not be charged. SDCWA has
10 never contended that it was legally entitled to charge Vista and
11 Escondido prevailing member rates or market rates for transportation
12 of Supplemental Water. SDCWA did not legally suffer monetary damages.

13 T. LEGISLATIVE PRICING POLICY

14 It is true that CA No. 3, p. 5, explicitly provides: SDCWA
15 "shall convey the Supplemental Water furnished to it by the United
16 States for use by the Settlement Parties" except "at times when all
17 of the available capacity in that portion of its facilities needed to
18 convey the Supplemental Water is being used for the delivery of
19 [SDCWA's] water to its member public agencies." There is no evidence
20 all of SDCWA's facilities were needed to deliver water to member public
21 agencies in 2017.

22 The purpose of the CA is to effectuate Congressional intent
23 that Supplemental water be provided to the Settlement Parties. This
24 is not disputed. Supplemental Water could not be available prior to
25 May of 2017 when the final settlement with FERC was concluded. The
26 overriding objective of the Supplemental Water statute is to provide
27 annually up to 16,000 AF of Supplemental Water to the Settlement
28 Parties. The CA had a subordinate purpose to assure that SDCWA was

1 to be compensated for conveyance of such Supplemental Water; however,
2 this purpose was to see that SDCWA was equitably compensated at a rate
3 lower than its member conveyance and prevailing transportation rates,
4 because the price of Supplemental Water was intentionally reduced to
5 achieve Congressional intent that Supplemental Water was to be
6 furnished at a preferred price.

7 Simply put, the SA's legislative purpose was not to assure
8 SDCWA was paid full price. As a matter of contract interpretation,
9 the CA did not empower SDCWA to determine whether Supplemental Water
10 existed, to refuse to deliver it when it was available, nor, itself
11 to declare whether the Supplemental Water was or was not available in
12 any year, nor whether Supplemental Water would or would not be conveyed
13 to the Settlement Parties. Instead, only one specific exception to
14 excuse conveyance of Supplemental Water to the Settlement Parties was
15 expressly included in the Conveyance Agreement. SDCWA was not a party
16 to the Settlement Agreement and had no statutory authority whatsoever
17 to interfere with or abrogate the Government's furnishing of
18 Supplemental Water to the Settlement Parties, up to 16,000 AF per
19 year, when Supplemental Water was available, as it was in 2017.

20 There is no dispute that as of May 2017, Supplemental Water
21 from the United States was available. It is true that the provisions
22 of CA No. 4., subsection i., and No. 5., subsection e., were operative
23 to coordinate Supplemental Water conveyances, protocol details,
24 including invoicing and payments and related issues. However, SDCWA
25 had no legal authority to declare that based on the first (later)
26 availability of Supplemental Water in May 2017, after April 1st, the
27 contractually scheduled Notice Date, that it could declare no
28

1 Supplemental Water existed and could not be conveyed to Respondents.

2 This is in effect an example of "the tail wagging the dog."

3 The statutory objective of the SA involved the United States
4 as provider of Supplemental Water, Metropolitan Water Authority of
5 Southern California, Department of the Interior, Bureau of
6 Reclamation, and SDCWA as conveyor. However, SDCWA was simply a link
7 in the chain to effectuate the statutory purpose and to be compensated,
8 albeit at less than its members' rate.

9 The Respondents have correctly argued that SDCWA's claim to
10 recover monetary damages of over \$2.2 million have not been legally
11 or logically established for the following reasons.

12 1. SDCWA has ignored the history, statutory purpose, and
13 its role in the coordinated responsibilities of all participants in
14 the SA to effectuate the conveyance and receipt of Supplemental Water
15 by the Settlement Parties.

16 2. SDCWA has provided no legal or logical authority that
17 gave it the ability to usurp and unilaterally defeat the Supplemental
18 Water statute (SA) and its purpose, by insisting that the statutory
19 language in the CA (No. 4., subsection i., and No. 5., subsection e.)
20 gave it the authority to unilaterally refuse to convey Supplemental
21 Water when such water was legally and actually available through
22 September 2017.

23 U. CONDITION PRECEDENT JURISPRUDENCE DOES NOT PREVAIL

24 The SDCWA's foundational contract law establishes a court's
25 duty to interpret a declaration of covenants, conditions,
26 restrictions, and other contractual provisions in a way that is both
27 reasonable and carries out the intended purpose of the contract and
28 the law. *Dieckmeyer v. Redevelopment Agency of Huntington Beach* (2005)

1 127 Cal.App.4th 248, 259 (citing *Battrim v. Emerald Bay Community*
2 Assn. (1984) 157 Cal.App.3d 1184, 1189.) Here, contrary to SDCWA's
3 insertion of itself to in effect become the arbiter of the availability
4 of Supplemental Water for 2017, by taking the position that CA No. 5.,
5 subsection e., excused it from dealing with Supplemental Water in
6 2017, the court's primary task is to give effect to the Legislature's
7 intended purpose in enacting the law. *People v. Hubbard* (2016) 63
8 Cal.4th 378, 386 (citing, *People v. Zambia* (2011) 51 Cal.4th 965, 976-
9 977.) SDCWA's interpretation defeats the seminal purpose of the SA
10 and is proof of No. 5., subsection e.'s obvious inconsistency with the
11 federal law, the SA.

12 This means the court begins with the statute's text, assigns
13 relevant terms their ordinary meaning, while also taking account of
14 any related provisions in the overall structure of the statutory
15 scheme. *Hubbard*, *id.* at p. 386; see, *People v. Cottle* (2006) 39
16 Cal.4th 246, 254.

17 Most importantly here, "essential is whether our
18 interpretation, as well as the consequences flowing therefrom,
19 advances the Legislature's intended purpose. Where the statutory text
20 admits of more than one reasonable interpretation, the court may
21 consider various extrinsic aids -- including the Legislative history
22 -- to the extent they are helpful, in illuminating that purpose. *Flour*
23 *Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198. SDCWA has, by
24 unilaterally declaring it had the right to not deliver the 2017
25 Supplemental Water, demonstrated there is more than one interpretation
26 of No. 5., subsection e., which in effect elevated SDCWA's purported
27 stature to do so and for SDCWA to be paid at its "regular rates."
28 This is inconsistent with and affords no respect to the United States

1 Congressional purpose of the SA to convey Supplemental Water and
2 destroys the statutory objective of providing annual Supplemental
3 Water at a preferred price when it is available. The undisputed and
4 unambiguous purpose of the Settlement Act was to in part compensate
5 the Settlement Parties for years of deprivation of their San Luis Rey
6 water rights.

7 **V. CONDITION PRECEDENT THEORY**

8 It is unnecessary to further analyze the SDCWA's contractual
9 condition precedent theory as the Respondents have provided valid
10 arguments that overcome the "condition precedent" theory, which SDCWA
11 seeks to utilize to destroy the purpose and effect of the SA. The
12 parties agreed in the IPA, recital 2., p. 2, and 3., p. 3., that 2017
13 Supplemental Water deliveries were made in the amount of 9,383 AF and
14 SDCWA reserved only two claims, that SDCWA deliveries of 2017
15 Supplemental Water were "not required" and it suffered monetary
16 damages based on the reduced prices it was paid for 1) Supplemental
17 Water and 2) the cost of its transportation of such water through the
18 SDCWA system.

19 Respondents' second contention is that SDCWA had no
20 authority to exalt its own monetary interests, over the Settlement Act
21 by deciding what was or was not Supplemental Water, and when it was
22 or was not available. That authority is solely vested in the United
23 States, the party statutorily responsible for providing Supplemental
24 Water under the SA. The third contention that SDCWA stipulated that
25 it would not pursue claims that were "allowed under the Reasoned
26 Decision" need not be addressed as claims for contractual monetary
27 damages were validly reserved under the auspices of the IPA and
28 Restatement 3d jurisprudence.

25 W. IMPOSSIBILITY

26 Impossibility of performance is defined as strict
27 impossibility and impracticability because of extreme and unreasonable
28 difficulty, expense, injury, or loss. *Autry v. Republic Productions*,

1 *Inc.* (1947) 30 Cal.2d 144, 149. (It is a question of law whether
2 impossibility exists in a given case.) The burden of proving the
3 defense of impossibility is on the party asserting it, SDCWA. *Hensler*
4 *v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 83.

5 Temporary impossibility suspends the duty until it no longer
6 exists. *Autry*, at p. 149; *Madlin v. Pacific Decision Sciences* (2006)
7 137 Cal.App.4th 1001, 1017 (the obligation to perform is not excused
8 or discharged by temporary impossibility, it is only suspended). In
9 order for there to be a "legal impossibility," the things to be done
10 must be impossible under all circumstances. Conditions making
11 performance unprofitable and more difficult or expensive do not extend
12 to performance of a contractual obligation. *Lloyd v. Murphy* (1940)
13 25 Cal.2d 48, 53. Here, the best evidence is that no more than
14 temporary "impossibility" existed; and that performance was
15 achievable, and in fact achieved.

16 Impossibility does not authorize a court to go beyond
17 interpreting the statute and simply invalidate it altogether.
18 Impossibility, as an aid to statutory interpretation, is akin to the
19 absurdity canon, which counsels courts to "avoid any [statutory]
20 construction that would produce absurd consequences." *Flannery v.*
21 *Prentice* (2001) 26 Cal.4th 572, 578. Where strict compliance with the
22 terms of a statute is impossible, compliance as near as can be has
23 been permitted on the principle that the law does not require
24 impossibility. *McMahon, infra*, 219 Cal.App.3d at p. 300.
25 Impossibility does not authorize judicial invalidation of a statute
26 on the ground that compliance is impossible. *National Shooting, id.*,
27 at p. 434, citing, *Board of Supervisors v. McMahon* (1990) 219
28 Cal.App.3d 286, 300 (Cal. Civ. C. § 3531 ("the law never requires
impossibilities.")) Impossibility means not only strict

1 impossibility but impracticability because of extreme and unreasonable
2 difficulty, expense, injury, or loss involved. *McMahon*, at p. 300.
3 Even, arguendo, if as of April 1, the evidence demonstrates that
4 compliance was actually then temporarily impossible, the statute
5 cannot be ignored or invalidated. *National Shooting*, *supra*, at p.
6 434. Here, Supplemental Water was available within 47 days following
7 April 1, SDCWA confirmed and admitted in writing that it was capable
8 of and ready to convey this Supplemental Water by July 1, 2017, and
9 it in fact did so. This overcame any alleged impossibility. No
10 impossibility to justify ignoring the statute and its purpose here
11 exists. Whether impossibility existed is a question of law. *Mitchell*
12 *v. Ceazan Tires, Ltd.* (1944) 25 Cal.2d 45, 48.

13 In this case, any impossibility was eliminated by the May
14 17th final settlement of the FEHA case. The statutory purpose of
15 providing Supplemental Water takes precedence over any payment rights
16 of SDCWA under the CA. As discussed, it was not the prerogative of
17 nor was SDCWA responsible to determine that no Supplemental Water
18 would be available in 2017, because April 1 had come and gone.
19 Deliveries did not have to start before July 1, 2017 and SDCWA had
20 from May 22, 2017 and all of June for its Board to address the issue
21 of how to deliver and manage payment for less than 10,000 AF of
22 Supplemental Water delivery. It is beyond comprehension that SDCWA,
23 with a \$900 million budget, competent management, and skilled
24 attorneys, asserts SDCWA could not, although they did in fact, possess
25 the ability to convey Supplemental Water to Respondents.

26 X. ALLEGED CONTRACT

27 1. MATERIALITY OF BREACH

1 The law distinguishes between material and non-material
2 breaches of contract. In contract law, only a material breach excuses
3 further performance by the innocent party. See generally, 1 Witkin,
4 Summary of Cal. Law (10th ed. 2005) Contracts, § 813, p. 906. Whether
5 a breach is material is generally a question of fact. (*Porter v.*
6 *Arthur Murray, Inc.* (1967) 249 Cal.App.2d 410, 421-422.) The
7 determination of the materiality of the breach often depends upon the
8 intent of the parties as well as the particular circumstances of the
9 case. (*Id.* at p. 422.)

10 Here, it is not susceptible to dispute that the overriding
11 purpose of the SA Legislation and Congressional intent was to provide
12 the Settlement Parties with Supplemental Water. This was the
13 culmination of decades-long water disputes and litigation over the San
14 Luis Rey River waters, including the federal government's breaches of
15 fiduciary duty to the Indian Tribes were proved. The SA case held
16 that Indian water rights, were ignored or misappropriated through the
17 years, giving rise to enactment of the SA remedial statute. Although
18 the timing of the original scheduling notice by April 1 of each year
19 was intended to facilitate the conveyor's (SDCWA) planning and
20 implementation of water deliveries, including adopting agreed-to
21 protocols concerning schedules, invoicing, and payment; all of these
22 provisions are subordinate and incidental to the over-arching
23 legislative purpose that Supplemental Water be provided to the
24 Respondents, who were entitled to the water. Despite the contentious
25 differences among the parties over the delivery date, agreeing to
26 protocols, and actually delivering Supplemental Water for 2017, all
27 of these disputes were incidental to the primary statutory purpose
28 that Supplemental Water was to be provided by the United States under
federal law. It was. To interpret such incidental and subordinate

1 provisions of the CA by exalting CA No. 4., subsection i., and No. 5.,
2 subsection e., as conditions precedent to block providing Supplemental
3 Water, is totally inconsistent with the SA's statutory purpose and
4 would invalidate that law. SDCWA had no unilateral right and
5 authority, as a facilitating conveyor, to thwart and destroy the entire
6 statutory purpose of providing Supplemental Water at preferred prices.
7 SDCWA had no such right to be paid on its terms for doing so, as a
8 matter of law.

9 Even, *arguendo*, if the untimely but earliest feasible Notice
10 of Schedules after April 1st, in May of 2017, and extended negotiations
11 to arrive at agreed-upon protocols by December 11, 2017, are viewed
12 as breaches, they are immaterial given the overall statutory scheme
13 and purpose to which SDCWA, was only one of the facilitating parties.
14 Such breaches were immaterial and did not give rise to an excuse of
15 either party's duty of counter-performance, nor did they entitle SDCWA
16 to recover monetary damages at non-preferred rates, as there was no
17 lawful entitlement to or proof of such damages.

18 CONCLUSION

19 This ends SDCWA's contentions that the CA was breached,
20 because no Supplemental Water was available despite the FERC
21 settlement in May of 2017. At that time, Respondents requested that
22 SDCWA convey the 2017 Supplemental Water. SDCWA is entitled to credit
23 for acting responsibly by conveying the 2017 Supplemental Water, while
24 reserving all rights of dispute, and preventing much greater harm to
25 Respondents by not interfering with the duties of the United States,
26 the Met, and the Bureau of Reclamation.

27 It is noteworthy that the Met granted credit to SDCWA based
28 in part on SDCWA's recognition and admission that the disputed water

1 it provided was Supplemental Water for 2017, not SDCWA's water. This
2 in part mitigated SDCWA's "alleged loss."

3 All of the arguments and contentions of Claimant and
4 Respondents have been fully considered. There is no need for further
5 analysis or discussion of any other arguments and contentions.

6 Having considered the briefs of the parties, all exhibits
7 submitted, oral arguments of the parties provided on November 15,
8 2018, based on this Reasoned Decision, the following orders are
9 entered.

10

11 ORDERS

12 1. Claimant SDCWA shall take nothing by its Demand for
13 Arbitration.

14 2. SDCWA has also requested that it "at least be awarded
15 transportation costs" at its general member rate and not the reduced
16 statutory rate under the Act. For all the reasons stated above, there
17 is no basis in law or fact to permit such an increased transportation
18 cost to be imposed which would constitute a violation of the Act and
19 Conveyance Agreement.

20 3. The Respondents' Motion for Summary Judgment is granted
21 as to each and every claim of SDCWA's demand.

22 4. Respectful request is made that judgment should be
23 entered in favor of Respondents and against Claimant, SDCWA, in
24 accordance with this Reasoned Decision by a court of competent
25 jurisdiction.

26 5. Pursuant to the parties' Arbitration Agreement, each
27 party shall bear the expense of its own counsel, experts, witnesses,
28 and preparation and presentation of evidence.

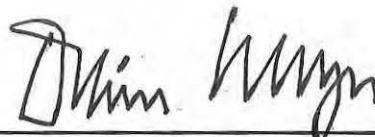
1 6. The Administrative fees and expenses of the American
2 Arbitration Association totaling \$14,700.00 are to be borne \$7,350.00
3 by San Diego County Water Authority; \$7,350.00 by San Luis Rey Indian
4 Water Authority. The Compensation and expenses of Arbitrator totaling
5 \$58,013.55 are to be borne \$29,006.78 by San Diego County Water
6 Authority; \$29,006.78 by San Luis Rey Indian Water Authority.
7 Therefore, San Luis Rey Indian Water Authority shall pay San Diego
8 County Water Authority, an amount of \$7,350.01.

9 7. Based on the uniqueness of the issues presented by the
10 Arbitration, it is fair and reasonable that each side bear its own
11 recoverable costs, that each side pay one-half of the court reporter's
12 fees and costs of the transcript.

13

14 SO ORDERED.

15 DATED: December 14, 2018.



16
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18 Hon. Oliver W. Wanger
19 U. S. District Judge (Ret.)
20 Arbitrator
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